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No. 82-118

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE	v
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
THE RULE ADOPTED BY THE FOURTH CIRCUIT, WHICH ALLOWS A TOLLING FOR PUTATIVE MEMBERS OF A CLASS WHO FILE SEPARATE ACTIONS AFTER THE CLASS IS DENIED CERTIFICATION, IS AN UNWARRANTED EXTENSION OF THE RULE IN *AMERICAN PIPE*	9
A. The Tolling Available to Putative Class Members Should be Limited to Persons Who Timely Seek to Intervene in the Original Action After Class Certification is Denied	9
B. A Rule Limiting Tolling to Persons Who Intervene in the Original Action, in Conjunction With Other Available Avenues of Relief, Provides a Comprehensive Scheme Under Which Putative Class Members Can Exercise Their Rights Under Title VII	17
C. Substantial Policy Reasons Favor Denying Tolling to Those Who File Separate Actions After Class Certification is Denied	20
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) ..... *passim*
Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977) 7, 15, 16
Bantolina v. Aloha Motors, Inc., 419 F. Supp. 1116 (D. Hawaii 1976) 17
Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 20
Davis v. Bethlehem Steel Corp., Civil No. M-82-3255 (D. Md.) 22
East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) vi
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) .. 7, 12, 13, 14
Ford Motor Company v. EEOC, 102 S. Ct. 3057 (1982) vi
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) ..... vi, vii
Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) vii
General Telephone Co. of the Southwest v. Falcon, 102 S. Ct. 2364 (1982) vi
Gluck v. Amicor, Inc., 487 F. Supp. 608 (S.D.N.Y. 1980) 14
Gramby v. Westinghouse Electric Corp., 84 F.R.D. 655 (E.D. Pa. 1979) 17
Green v. United States Steel Corp., 481 F. Supp. 295 (E.D. Pa. 1979) 17
In Re Fine Paper Litigation, 632 F.2d 1081 (3d Cir. 1980) 17
Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) vii
Jefferson v. H.K. Porter Co., 485 F. Supp. 356 (N.D. Ala. 1980), *aff'd*, 648 F.2d 337 (5th Cir. 1981) 14
Lane v. Bethlehem Steel Corp., 93 F.R.D. 611 (D. Md. 1982) 22
Nelson v. United Credit Plan, Inc., 77 F.R.D. 54 (E.D. La. 1978) 17

TABLE OF AUTHORITIES—Continued

	Page
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944)	11
Pavlak v. Church, 681 F.2d 617 (9th Cir. 1982)	7, 13, 16
Pendleton v. Crown, Cork & Seal Company, Inc., Civil No. M-78-1734 (D. Md.)	2, 3, 5, 7, 8, 18, 19
Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978), *vacated for reconsideration*, 445 U.S. 940 (1980)	17
Shell Oil Company v. Anne M. Dartt, 434 U.S. 99 (1977)	vii
Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978)	7, 15
Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980)	17
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	vi
United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)	19
Wachovia Bank & Trust v. Nat. Student Marketing, 461 F. Supp. 999 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981)	13, 14
Zipes v. Trans World Airlines, Inc., 102 S. Ct. 1127 (1982)	vii
Statutes and Rules:	
Fed. R. App. P. 4(a)	19
Fed. R. Civ. P. 23	4, 6, 8, 10, 21, 22
Fed. R. Civ. P. 23(a)	4
Fed. R. Civ. P. 23(a)(1)	10
Fed. R. Civ. P. 23(b)(2)	2, 13
Fed. R. Civ. P. 23(b)(3)	7, 12, 13, 16
Fed. R. Civ. P. 23(c)(1)	15
Fed. R. Civ. P. 23(c)(2)	12
Fed. R. Civ. P. 24(b)	5, 11, 12
Fed. R. Civ. P. 56	4
Rule 42.3, Rules of the Supreme Court of the United States	v

TABLE OF AUTHORITIES—Continued

Page

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* .....vi, 6, 7, 8, 9, 17, 18, 19, 20, 22, 23

Miscellaneous:

Note, *Federal Courts—Rules of Civil Procedure—Postjudgment Motion to Intervene to Appeal Denial of Class Certification is Timely*—United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), 1978 B.Y.U. L. REV. 189 14

3B *Moore's Federal Practice* ¶ 23.90[3] (1981) 14

Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After* American Pipe and Construction Co. v. Utah, 48 S. CAL. L. REV. 771 (1975) 14

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42.3 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting the petitioner, Crown, Cork & Seal Company, Inc., in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Substantially all of EEAC's members, or their contituents, are employers subject to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—i.e., whether the pendency of a proposed class action tolls the running of a limitations period for purposes of allowing potential class members to file separate actions after certification of a class is denied.

3. EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g, Ford Motor Company v. EEOC*, 102 S. Ct. 3057 (1982); *General Telephone Co. of the Southwest v. Falcon*, 102 S. Ct. 2364 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *East Texas Motor Freight System, Inc. v. Rodriguez*,

431 U.S. 395 (1977); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

4. In several cases, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); *Shell Oil Company* v. *Anne M. Dartt*, 434 U.S. 99 (1977); *Zipes v. Trans World Airlines, Inc.*, 102 S. Ct. 1127 (1982).

5. The written consent of counsel for the petitioner, Crown, Cork & Seal Company, Inc., has been filed with the Clerk of the Court. Efforts to obtain the consent of the counsel for the respondent, Theodore Parker, were unsuccessful.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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December 23, 1982

IN THE

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae in support of the petitioner contingent upon the Court's granting the accompanying motion.

INTEREST OF THE AMICUS CURIAE

The interest of EEAC in this case is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

Theodore Parker, a black male, was discharged from Crown, Cork & Seal Company, Inc. ("Crown") on July 15, 1977. On October 3, 1977, he filed a

charge of discrimination with EEOC alleging racially discriminatory harassment and discharge. The charge was deferred to the Maryland Commission on Human Relations ("MCHR"). On September 15, 1978, a separate class action was filed against Crown by two other persons in *Pendleton v. Crown, Cork & Seal Company, Inc.*, Civil No. M-78-1734 (D. Md.) (hereinafter "*Pendleton*"), alleging racially discriminatory harassment and discharges, among other claims. On November 9, 1978, EEOC adopted the findings of the MCHR, found no reasonable cause on Parker's charge and issued a "Notice of Right to Sue" within ninety days. Parker received the "Notice of Right to Sue" and did not file suit within the specified ninety-day period.

On May 31, 1979, the named plaintiffs in the *Pendleton* case moved to certify a class pursuant to Rule 23(b)(2)[1] of the Federal Rules of Civil Procedure. Plaintiff Pendleton sought to represent a class of black employees who could have filed a charge of racially discriminatory termination on or after January 12, 1973. Plaintiff Allen sought to represent a class of black employees who could have filed charges of racially discriminatory termination, job assignment, retaliation and harassment. On July 13, 1979, the district court held a hearing and ruled on certain of the

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[1] Rule 23(b)(2) provides that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

class certification issues, while reserving certain other issues. Plaintiffs Pendleton and Allen moved to reconsider certain of these rulings. On July 25, 1980, EEOC sent a second "Notice of Right to Sue" to Parker.

By order dated September 4, 1980, the court in the *Pendleton* case "decided to reiterate its previous rulings as well as now rule on the questions reserved." Memorandum and Order, Civil No. 78-1734 (D. Md. September 4, 1980). In its memorandum and order, the court stated that:

> Plaintiff Pendleton's motion to represent *all* black employees terminated on or after January 12, 1973, was denied at the hearing of July 13, 1979, for two reasons: his claims were not typical of those of the putative class and he was an inadequate class representative.

Id., at 2. Among the reasons for the denial was the fact that Pendleton, as a probationary employee, would not have claims which were typical of Crown's permanent employees, nor would he adequately represent the permanent employees. On the question of whether Pendleton could represent a class of black probationary employees, which question was reserved at the close of the July 13, 1979, hearing, the court denied certification because the plaintiffs failed to satisfy their burden as to numerosity and adequacy of representation.

With regard to Allen's motion for class certification, the court stated:

> At the close of the hearing on July 13, 1979, the court denied Allen's motion to represent a class of black employees on the issues of termination, job assignment, and retaliation. The question whether Allen could represent a class on the issue

> of harassment was reserved. Plaintiffs have filed a motion for reconsideration on the issue of termination and defendant has filed a response.

Id., at 6. Further, the court stated that at the close of the hearing on July 13, 1979, it had denied Allen's motion for class certification on the issue of termination "finding that Allen's claim was at best part of his reprisal claim because he did not file an administrative charge of discriminatory termination subsequent to his firing on September 4, 1974." *Id.*, at 8. The court concluded that Allen could not represent a class of black employees on the issue of termination because "[p]laintiffs have not only failed to satisfy the Rule 23 requirements of numerosity and typicality on this issue, but have also not demonstrated that the termination issue is properly before the court." *Id.*, at 10. Finally, with regard to the question of whether Allen could represent a class of black employees on the claims of harassment, which question was reserved at the end of the July 13, 1979, hearing, the court concluded that the plaintiffs had failed to carry their burden under Rule 23(a) [2] of the Federal Rules.

On October 27, 1980, Parker filed the instant action. Thereafter, Crown moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that Parker's suit was filed

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[2] Rule 23(a) reads as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

nearly two years after he received his ninety-day "Notice of Right to Sue." Before that motion was decided, on February 26, 1981, a stipulated order of dismissal with prejudice was entered by the district court in the *Pendleton* case as a result of a settlement of the individual claims of Pendleton and Allen. On March 30, 1981, Parker moved to intervene in the *Pendleton* case, pursuant to Rule 24(b) [3] of the Federal Rules of Civil Procedure, in order to appeal the denial of class certification. The district court granted Parker's motion to intervene on April 16, 1981. On May 14, 1981, Parker noticed an appeal to the Fourth Circuit Court of Appeals. Subsequently, however, Parker consented to Crown's motion to dismiss the appeal as untimely filed.

In Parker's individual suit, the district court dismissed the action as untimely, ruling that the ninety-day period for filing a Title VII suit had not been met. In an opinion reported at 514 F. Supp. 122 (D. Md. 1981), the district court (Miller, J.) held "that the *American Pipe* tolling rule is applicable only to Title VII class members who seek intervention in the original suit," 514 F. Supp. at 126, and is not tolled with respect to separate, individual actions. The Fourth Circuit Court of Appeals reversed the district court in an opinion reported at 677 F.2d 391 (4th Cir. 1982), holding that "the pendency of a putative class

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[3] Rule 24(b) reads in pertinent part as follows:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

action tolls the running of limitations for members of the putative class both for purposes of intervention and the filing of a new suit based upon a cause of action embraced within the putative class action until certification of the class is denied." 677 F.2d at 394.

SUMMARY OF ARGUMENT

The rule adopted by the Fourth Circuit allowing tolling for putative class members who file separate actions after class certification is denied is an unwarranted and unnecessary extension of the tolling rule established in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974) (*"American Pipe"*). Since there are a number of alternative means by which Title VII claimants can exercise their rights, including intervention following the denial of class certification, there is no compelling rationale for extending the *American Pipe* rule. In addtion, the tolling rule established by the Fourth Circuit is likely to result in a decrease in the litigative efficiency and economy which the *American Pipe* rule was designed to foster.

In *American Pipe*, this Court held that "the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene after the court has found the suit inappropriate for class action status.*" *Id.*, at 553 (emphasis added). The *American Pipe* rule was designed to promote "the efficiency and economy of litigation which is a principal purpose of [Rule 23]," *id.*, at 553, by precluding the need for putative class members to file protective motions to intervene during the pendency of class certification. As such, the *American Pipe* decision provides a limited equitable tolling for those who seek to intervene fol-

lowing denial of class certification. Nowhere in the *American Pipe* decision does the Court discuss or contemplate a tolling for purposes of filing a *separate action*. Neither does this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), offer support for the Fourth Circuit rule, since that case involved a class which was *certified* pursuant to Rule 23(b)(3) and since the tolling issue was not before the Court in that case.

The rule adopted by the Second and Ninth Circuits, which limits tolling to putative class members who timely seek to intervene after class certification is denied, is consistent with the rationale of *American Pipe* and is supported by strong policy considerations. *See, Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982); *Stull v. Bayard*, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977). In *Pavlak*, the Ninth Circuit stated that neither the *American Pipe* principles of fairness to plaintiffs who refrained from filing based on the pending class suit nor the judicial efficiency derived from eliminating the need to file protective motions "avails a plaintiff who fails to intervene but instead files an individual suit after class certification has been denied." 681 F.2d at 620.

The Second and Ninth Circuit rule, in conjunction with alternative means of asserting a Title VII claim, provide a wholly adequate mechanism by which Title VII claimants can assert their rights. In the instant case, the plaintiff could have filed a timely separate action or moved to intervene in the pending class action following receipt of his "Notice of Right to Sue" from EEOC. He also could have moved to intervene in the *Pendleton* case following the denial of class

certification in that case. Finally, following the dismissal of the *Pendleton* case, he could have moved to intervene and filed a timely appeal of the denial of class certification. These various alternative procedures provide a wholly adequate means for the assertion of Title VII rights, without extending the *American Pipe* rule to separate actions.

The rule adopted by the Fourth Circuit presents serious problems of judicial administration and is likely to undermine the economy and efficiency of litigation which the *American Pipe* rule was designed to foster. The Fourth Circuit rule is likely to encourage a form of "one-way intervention" and forum shopping which Rule 23 was designed to prevent by allowing putative class members to seek to intervene if the litigation appears likely to produce a favorable result, or to file a separate action if they deem that more advantageous. In addition, the Fourth Circuit rule is likely to encourage "overlapping class actions" where a putative class member files a separate class action after denial of class certification in the original action. Such overlapping classes could lead to an indefinite tolling of the limitations period and is inconsistent with the strict time periods for filing set forth in Title VII as well as the underlying purposes of Rule 23. The Second and Ninth Circuit rule, in addition to providing an adequate means for the assertion of Title VII claims, also serves the interests of judicial efficiency and economy by allowing the judge who is familiar with the facts of the case to handle the claims of putative class members as well.

ARGUMENT

THE RULE ADOPTED BY THE FOURTH CIRCUIT, WHICH ALLOWS A TOLLING FOR PUTATIVE MEMBERS OF A CLASS WHO FILE SEPARATE ACTIONS AFTER THE CLASS IS DENIED CERTIFICATION, IS AN UNWARRANTED EXTENSION OF THE RULE IN *AMERICAN PIPE*

This Court, in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), held that the commencement of a class action tolls the statute of limitations for putative members of the class who timely seek to intervene after the court has denied class certification. Nothing in the *American Pipe* decision, nor in later cases decided by this Court, warrants the extension by the Fourth Circuit of the *American Pipe* tolling rule to putative members of the class who file a *separate action* after class certification is denied. Given the numerous other means, including timely intervention in the original action, by which aggrieved plaintiffs in these circumstances can exercise their rights under Title VII, there is no reason to extend the *American Pipe* rule to include persons filing separate actions. Such an extension is likely to produce substantial problems of judicial administration and may undermine seriously the important goals of litigative efficiency and economy which the *American Pipe* rule was designed to further.

A. The Tolling Available to Putative Class Members Should be Limited to Persons Who Timely Seek to Intervene in the Original Action After Class Certification Is Denied

American Pipe involved a private antitrust action that was filed eleven days prior to the expiration of the statute of limitations period. The trial court later denied certification of a class of plaintiffs because the

class did not satisfy the requirements of numerosity set forth in Rule 23(a)(1). No one appealed the denial of class certification. Eight days after denial of class certification, a number of putative class members moved to interevene as plaintiffs in the original action. The trial court denied intervention, concluding that the statute of limitations had not been tolled as to the putative class members by the institution of the class action and that they were precluded from suit by the running of the limitations period.

This Court held that the commencement of the original class suit tolled the running of the statute of limitations for putative class members of the class who timely sought to intervene after class certification was denied. In so doing, the Court stated:

> We hold that in this posture, at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene after the court has found the suit inappropriate for class action status.*

Id., at 552-53 (emphasis added). In adopting this rule, the Court reasoned that under a contrary rule "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable," *id.*, at 553, thus "depriv[ing] Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Id.*

The rule adopted in *American Pipe* was deemed by the Court to be consistent with the purpose of a

statute of limitations of preventing surprises "through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.*, at 554, citing *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). However, the rule set forth in *American Pipe* contemplated only situations in which "the actual trial is conducted in the form of a class action, as a joint suit, *or as a principal suit with additional intervenors.*" *Id.*, at 555 (emphasis added).

Justice Blackmun, in his concurring opinion in *American Pipe*, offered a cautionary note regarding the limited scope of the tolling rule established:

> Our decision, however, must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class.

Id., at 561. In addition, Justice Blackmun stated that:

> Permissive intervenors may be barred . . . if the district judge, in his discretion, concludes that the intervention will 'unduly delay or prejudice the adjudication of the rights of the original parties.' Fed. Rule Civ. Proc. 24(b). The proper exercise of this discretion will prevent the type of abuse mentioned above and might preserve a defendant whole against prejudice arising from claims for which he has received no prior notice.

Id., at 562. Nowhere in the *American Pipe* decision does the Court discuss or contemplate the filing of

separate actions. Not only did the Court limit its discussion to instances where putative class members timely sought to intervene, it also instructed the lower courts to exercise their discretion under Rule 24(b) to insure that defendants were not prejudiced by the tolling rule. Thus, the Fourth Circuit rule, which allows tolling of limitations periods where a separate action is filed, represents an extension beyond those circumstances envisioned by the Court in *American Pipe*.

In adopting the rule that allows a tolling for putative class members who file separate actions, the Fourth Circuit acknowledged that this Court has not "applied the holding in *American Pipe* in any other context [other than intervention]." 677 F.2d at 393. Lacking direct Supreme Court support for its holding, the Fourth Circuit looked to dictum in a footnote in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), a case dealing with another issue and holding only that where a Rule 23(b)(3) class is certified, Rule 23(c)(2) requires that notice *must* be sent to all class members whose names and addresses may be determined through a reasonable effort. In response to an argument that individual notice was not necessary because class members would not opt out of the class since the statute of limitations period had run, the Court in *Eisen* stated that:

> This contention is disposed of by our recent decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

Id., at 176 n. 13. This footnote, however, should not be read as determining the issue in this case, because

the tolling issue was not before the Court in *Eisen*. *American Pipe*, to which *Eisen* referred, concerned the question of intervention, not individual suits.

The Ninth Circuit in *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), rejected the argument that the *American Pipe* tolling rule was extended by the footnote in *Eisen*, discussed above. In so doing, the court stated:

> We do not read it, however, as effecting a drastic expansion of *American Pipe* beyond the solid equities of its factual underpinnings. The footnote seems to allow a class member who opts out at the time of receiving notice of the institution of a class action to commence his own separate suit. It does not, however, authorize tolling of the statute of limitations for those who file separate actions at the time of denial of class certification. That issue was not presented in *Eisen*.

Id., at 620-21. *Accord, Wachovia Bank & Trust Co. v. Nat. Student Marketing*, 461 F. Supp. 999, 1012 (D.D.C. 1978), *aff'd on this ground, rev'd on other grounds*, 650 F.2d 342, 346 n. 7 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

The dictum from *Eisen* therefore is not instructive of the instant issue. In *Eisen* the Court was concerned with a class which had been certified pursuant to Rule 23(b)(3) and *not* one where certification was denied, as in *American Pipe* and the instant 23(b)(2) case. The Court in *American Pipe* determined that "a timely class action complaint commences the action for all members of the class *as subsequently determined*." 414 U.S. at 550 (emphasis added). The language in the *Eisen* footnote merely confirms that the statute of limitations is tolled for all class members *as subse-*

quently certified. Accordingly, the *Eisen* footnote addresses a situation which is markedly different from that presented herein and offers no guidance as to whether the *American Pipe* rule should be extended to the instant situation.

Numerous courts and commentators who have addressed the issues presented herein have concluded that the *American Pipe* rule is available only to putative class members who timely seek to intervene in the original action after class certification is denied.[4]

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[4] For other decisions holding or suggesting that putative class members may receive the benefits of tolling only if they *intervene* after class certification is denied, *see Wachovia Bank & Trust Co. v. Nat. Student Marketing Corp.*, 461 F. Supp. 999, 1012 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342, 346 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Jefferson v. H.K. Porter Co.*, 485 F. Supp. 356, 360-61 (N.D. Ala. 1980), *aff'd*, 648 F.2d 337 (5th Cir. 1981); *Gluck v. Amicor, Inc.*, 487 F. Supp. 608, 614-15 (S.D.N.Y. 1980). Various commentators have also persuasively maintained that the tolling rule of *American Pipe* is limited to putative class members who seek to intervene. *See e.g.*, 3B *Moore's Federal Practice* ¶ 23.90[3], at 23-556 n. 16 (1981) ("Although the statute of limitations is tolled by the filing of a class action for purposes of permitting a member of the purported class to intervene after the class has been disallowed, it is doubtful that a class member will be permitted to bring an individual action after the statute of limitations had run."); Note, *Federal Courts—Rules of Civil Procedure—Postjudgment Motion to Intervene to Appeal Denial of Class Certification is Timely*—United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), 1978 B.Y.U. L. REV. 189, 194 ("Where the statute of limitations has run after the filing of the class action complaint but before denial of class certification, all excluded parties will be barred from filing their own actions, and it appears that they can seek relief only by moving to intervene in the individual action that was brought before the statute of limitations ran."); Wheeler, *Predismissal Notice*

In *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977), an action alleging violations of federal securities laws, the Second Circuit limited the *American Pipe* ruling to those putative class members who sought to intervene in the original action. In so doing, the court stated:

> Of especial significance is the fact that the rule of *American Pipe* was intended for the benefit of purported members of the class who sought to *intervene* in the action after class status was denied . . . To suspend the statute in this case, however, would result in the maintenance of another suit by plaintiffs who took no action for almost five years after they were aware of information sufficient to put them on notice of possible fraud by the defendant.

Id., at 783 (footnote omitted). Similarly, in *Stull v. Bayard*, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), the Second Circuit again refused to extend the benefit of tolling to putative class members who filed a separate action rather than intervening. The court stated:

> Appellant's argument that this reprieve should be extended to class members who file separate suits after the class action has been terminated and the statute of limitations has expired is completely without merit. '[T]he rule of *American Pipe* was intended for the benefit of purported members of

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and Statutes of Limitations in Federal Class Actions After American Pipe and Construction Co. v. Utah, 48 S. CAL. L. REV. 771, 783 (1975) ("By allowing plaintiffs to sue after an adverse 23(c)(1) determination only by intervening, rather than by commencing new actions elsewhere, the Court ensures that all plaintiffs will appear together in a single court to litigate matters familiar to that court").

> the class who sought to *intervene* in the action after class status was denied.' *Arneil v. Ramsey, supra*, 550 F.2d at 783.

Id., at 433.

The Ninth Circuit has taken a similar approach in *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), in holding that a statute of limitations was not tolled where a putative class member filed a separate action after class certification pursuant to Rule 23(b)(3) was denied. The court in *Pavlak* concluded that:

> *American Pipe* permitted a toll of the statute of limitations for a class member who intervened in the action in which class certification was denied and we conclude that its rationale cannot be extended to those who do not intervene, or try to do so.

Id., at 618. In so holding, the Pavlak court discussed the reasons for tolling a limitations period:

> There are two principle reasons for tolling a limitations statute pending class certification. The first is fairness to any plaintiffs who may have refrained from filing suit or moving to intervene, expecting the case to proceed as a class suit. The second, closely related, justification for the tolling rule is that it serves judicial efficiency by eliminating the need to file intervention motions as a protective measure before the certification ruling is issued. Tolling the statute protects those interests by permitting plaintiffs to defer intervention motions until the class certification issue is decided. These are the principles underlying *American Pipe*. Neither of these reasons, however, avails a plaintiff who fails to intervene but files an individual suit after class certification has been denied.

Id., at 620. The reasons for tolling advanced by the Ninth Circuit are persuasive and, as will be discussed in parts B and C herein, neither of these reasons is furthered by tolling in order to allow the filing of a separate action.[5]

As the above discussion demonstrates, neither the *American Pipe* decision nor subsequent decisions provide a persuasive rationale for extending tolling to putative class members who file a separate action. As will be set forth below, substantial policy and administrative reasons exist why such an extension of the *American Pipe* rule should not be sanctioned by this Court.

B. A Rule Limiting Tolling to Persons Who Intervene in the Original Action, in Conjunction with Other Available Avenues of Relief, Provides a Comprehensive Scheme Under Which Putative Class Members Can Exercise Their Rights Under Title VII

Pursuant to Title VII and case law as determined by this Court, there exists a comprehensive and multifaceted scheme under which a Title VII plaintiff such

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[5] For decisions which have held or implied a tolling for putative class members filing separate actions, *see e.g., In Re Fine Paper Litigation*, 632 F.2d 1081, 1087 (3d Cir. 1980); *Susman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980); *Satterwhite v. City of Greenville*, 578 F.2d 987, 996-97 (5th Cir. 1978), *vacated for reconsideration*, 445 U.S. 940 (1980); *Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (E.D. Pa. 1979); *Green v. United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D. Pa. 1979); *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D. La. 1978); *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121-22 n. 19 (D. Hawaii 1976). For the reasons stated herein, those decisions provide no persuasive reason for extending the *American Pipe* tolling rule to persons who file separate actions.

as Parker can exercise his rights. In the instant case, there were at least five alternatives means available to Parker at various stages of the *Pendleton* litigation and thereafter for asserting his claim against Crown. Such a comprehensive scheme provides a wholly adequate mechanism for a Title VII plaintiff to have his grievance litigated, without the need for an extension of the *American Pipe* tolling rule to include separate actions filed after class certification is denied.

First, Parker could have had his claim heard by filing an individual action within ninety days of receipt of the "Notice of Right to Sue" issued by EEOC on November 9, 1978. Such an action could have been filed separately from the then-pending *Pendleton* case. Secondly, Parker could have moved to intervene in a timely manner as a named plaintiff in the *Pendleton* case after receipt of his "Notice of Right to Sue." By so intervening, he could have asserted his claim separately or as part of the class allegations then pending. A third possible point at which Parker could have taken action on his claim was following the denial on July 13, 1979, in the *Pendleton* case, of certain of the class allegations raised therein.[6]

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[6] The district court, on July 13, 1979, in *Pendleton*, apparently denied Pendleton's motion to represent *all* black employees terminated on or after January 12, 1973. This denial of a class of all terminated employees was based on the fact that Pendleton was a probationary employee and was not typical of and would not adequately represent permanent employees of Crown. Memorandum and Order, Civil No. 78-1734 (D. Md. September 4, 1980) at 2. Likewise, the district court apparently denied on July 13, 1979, plaintiff Allen's motion for certification of a class of terminated employees. *Id.*, at 6. In his brief in the Fourth Circuit, Parker acknowledges that "[a]t a hearing on July 13, 1979, the Court denied class certification, and by Memorandum and

The fourth opportunity which Parker could have used to assert his claim would have been by moving to intervene in *Pendleton* after class certification was denied on September 4, 1980. However, rather than moving to intervene in the *Pendleton* case in order to take advantage of the *American Pipe* tolling doctrine, Parker filed the instant separate lawsuit. Finally, Parker could have moved to intervene in the *Pendleton* case within thirty days of the order of dismissal in that case in order to challenge on appeal the denial of class certification. In *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), this Court held that a motion to intervene in order to appeal the denial of class certification was timely when filed within the thirty-day period for taking an appeal from the entry of final judgment.[7] Parker did seek to intervene in the *Pendleton* case for purposes of challenging the denial of class certification, and the district court granted intervention, but Parker failed to file the appeal in a timely manner.

Given the various ways in which Parker could have exercised his rights under Title VII, his failure to do so can only be attributed to the fact that he "slept

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Order dated September 4, 1980, it reiterated its prior rulings after a Motion to Reconsider the class rulings by Allen and Pendleton." Brief of Appellant at 2. Thus, it would appear that all class claims relating to terminated permanent employees, of which Parker was a putative member, were denied on July 13, 1979. Parker's failure to take *any* action to assert his termination claim within ninety days of class certification denial would apparently render the later assertion of any termination claim by him untimely. In any event, the filing of a motion to reconsider the denial of class certification would not toll the running of the ninety-day period.

[7] *See* Fed. R. App. P. 4(a).

on his rights," *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965), and not to any deficiency in the alternatives available to him for asserting his claim. These alternatives provide a wholly adequate means for the assertion of Title VII rights, without extending the *American Pipe* rule to separate actions.

C. Substantial Policy Reasons Favor Denying Tolling to Those Who File Separate Actions After Class Certification is Denied

Important goals of litigative efficiency and economy are served by limiting tolling to putative class members who seek to intervene after class certification is denied. Since the rule adopted by the Fourth Circuit presents serious problems of judicial administration and since that rule is unnecessary to protect the rights of Title VII litigants, any such extension of the *American Pipe* tolling rule should be rejected by this Court.

Since putative class members, who otherwise would be time-barred, are in effect "riding" the filing date of the named plaintiff in the proposed class action, it is not unreasonable to limit the putative class members to intervention in that original action once class certification is denied. Such a limitation, while not interfering with putative class members' ability to assert their claims, has advantages not present when separate actions are allowed. Since the trial judge in the original action is familiar with the facts, efficiency of judicial administration is served by having that judge handle the claims of putative class members as well. In addition, the original trial judge will be in a position to make informed decisions on the timeliness of putative class members' motions to intervene as well as to resolve any questions of adequate

notice to defendants which might arise. *See American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring).

The rule adopted by the Fourth Circuit, however, may foster the very problem of "one-way intervention" which Rule 23 was designed to eliminate. Under former Rule 23 prior to its amendment in 1966, the so-called "spurious" class action often led to "one-way intervention." This Court in *American Pipe*, 414 U.S. at 547, described the problem under former Rule 23 as follows:

> A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment.

A similar form of "one-way intervention" would be encouraged by the Fourth Circuit rule. Under such a rule, putative class members would be allowed to seek to intervene if they believed the litigation or judge was likely to produce a favorable result, or file a separate action should the litigation take an unfavorable turn. Thus, the Fourth Circuit rule would allow a form of the "one-way intervention" which Rule 23 was designed to eliminate. In addition, the Fourth Circuit rule will likely do additional damage to the purposes underlying Rule 23 by encouraging putative class members to abandon the class and file separate actions when class certification is denied,

rather than intervening for purposes of challenging the denial of class certification when final judgment is entered.

Another serious problem presented by the Fourth Circuit rule is that of "overlapping class actions" filed in separate actions by putative class members. Such an overlapping would occur where a putative class member, taking advantage of tolling, files a separate class action. Not only could this lead to an indefinite tolling of the limitations period, it also would provide putative class members with multiple opportunities to attempt to secure certification of the same or similar class which was denied in the original action. Such overlapping suits are not only inconsistent with the relatively short time periods established under Title VII but also are inconsistent with the purposes underlying Rule 23.[8] For example, permitting the commencement of potential additional class actions of as-yet undetermined scope would improperly deny a defendant in the initial class action of

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[8] The serious problems that may arise from such "overlapping class actions" is illustrated by the case of *Lane v. Bethlehem Steel Corp.*, 93 F.R.D. 611 (D. Md. 1982). *Lane* was filed as a class action in 1971 alleging various discriminatory practices at Bethlehem's plant at Sparrow's Point, Maryland. A decision to deny class certification was not made by the district court until 1981. Following denial of class certification, and settlement of the named plaintiffs' claims, four putative class members moved to intervene in the *Lane* action for purposes of appealing the denial of class certification. 93 F.R.D. at 613. In addition, the same four putative class members filed a *separate class action* entitled *Davis v. Bethlehem Steel Corp.*, Civil No. M-82-3255 (D. Md.), in which they sought to represent a class of over nine hundred persons. If this class is certified, Bethlehem would have to defend against claims going back as far as 1967.

notification of "the substantive claims being brought against them, [and] also the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 555.

A rule limiting tolling to those putative class members who timely seek to intervene in the original action after class certification is denied provides a means by which Title VII claimants adequately can assert their claims, while furthering the important goals of litigative efficiency and economy. Since the Fourth Circuit rule has substantial drawbacks, including the likelihood of "one-way intervention" and overlapping class actions, and since it is not necessary to effectuate the purposes of the *American Pipe* tolling doctrine, the Fourth Circuit rule should be rejected.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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